



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 14, 2003

Ms. Tenley Aldredge
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767-1748

OR2003-3252

Dear Ms. Aldredge:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181036.

The Travis County Attorney's Office (the "county") received a request for the following information:

1. All records related to pay disputes with any Travis County employees specifically regarding compensation for unpaid time owed to them for "on call" time within the past five years; this includes but is not limited to the Travis County employees Maintenance Department or Facilities Management Department;
2. Any settlement agreements made with Travis County employees within the past five years that relate to claims for compensation for "on-call" status and for compensation for "call-back" work performance.

You state that some responsive information has been released to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, and 552.130 of the Government Code. We have considered the

exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We first note, and you acknowledge, that the county did not claim sections 552.117 and 552.130 of the Government Code as exceptions to disclosure within the ten business day period mandated by section 552.301(a) of the Government Code. Because sections 552.117 and 552.130 may provide compelling reasons for withholding the information at issue, we will address those arguments together with your other, timely arguments.

We next note that a portion of the submitted materials includes information made public by section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section reads

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(18). *See* Civ. Prac. & Rem. Code § 154.073(d) (settlement agreement to which governmental body is party is public information and subject to or excepted from required disclosure in accordance with Act). The information subject to section 552.022 must therefore be released unless the information is expressly made confidential under other law.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You argue that the submitted settlement agreement should be withheld from disclosure under section 552.101 of the Government Code because a condition to the settlement agreement is that the terms remain expressly confidential to the involved parties. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, the settlement agreement must be released, notwithstanding any agreement specifying otherwise.

You argue that an e-mail communication from an Assistant County Attorney to a mediator is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. Section 154.073 states in pertinent part:

(a) Except as provided by Subsections (c), (d), and (e),² a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

² Subsections 154.073(c), (d), and (e) are inapplicable in this instance.

Civ. Prac. & Rem. Code § 154.073(a), (b). We understand you to inform us that the county and other parties to Cause No. 98-06351, *Larry Laws v. Travis County, Texas*, engaged in mediation to try and resolve the lawsuit through alternative dispute resolution. Upon consideration of your arguments and our review of the submitted information, we conclude the county must withhold this information from disclosure under section 552.101 in conjunction with section 154.073 of the Civil Practices and Remedies Code. We have marked the information accordingly.

You contend that certain personal financial information is protected from disclosure by the common-law right of privacy. Section 552.101 also encompasses the common-law right of privacy. Information is protected by the common-law right of privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 611 at 1 (1992). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). Based upon our careful review of the submitted records, however, we find that no portion of the information you have marked is the type of information that is confidential under common-law privacy. Thus, we conclude that none of the submitted information may be withheld under section 552.101 in conjunction with common-law privacy.

The county claims protection for some of the submitted information under section 552.117(2) of the Government Code. Section 552.117(2) excepts from disclosure the home addresses and telephone numbers, social security numbers, personal pager numbers, and family member information of peace officers, regardless of whether the officer elected confidentiality under section 552.024 of the Government Code. *See* Gov't Code § 552.117(2). *See also* Open Records Decision No. 670 (2001) (providing that governmental body may withhold home address, home telephone number, personal cellular phone number, personal pager number, social security number, and family member information of peace officer under section 552.117(2)). Thus, the county must withhold those portions of the records that reveal an officer's home address, home telephone number, social security number, and any information that reveals whether the officer has family members. The

county must also withhold the officer's *former* home address and telephone information from disclosure. *See* Open Records Decision No. 622 (1994).

Section 552.117(1) may also be applicable to some of the submitted information. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the county may only withhold information under section 552.117(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the county must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The county may not withhold this information under section 552.117(1) for those employees who did not make a timely election to keep the information confidential.

For those employees who did not make a timely election under section 552.024, social security numbers may be confidential under federal law. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the county pursuant to any provision of law, enacted on or after October 1, 1990.

We note that section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an

agency of this state. Thus, we have marked the information in the submitted documents that the county must withhold pursuant to section 552.130.

We further note that the submitted information contains account numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The county must, therefore, withhold the marked account numbers under section 552.136.

You next contend that a portion of the submitted information is excepted from public disclosure under section 552.107(1) of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

After carefully reviewing your arguments and the submitted information, we conclude that many of the documents you have marked as excepted from disclosure under section 552.107 may be withheld under that section. However, in some cases, the information you wish to withhold does not constitute a communication for purposes of section 552.107. Furthermore, the submitted documents also include handwritten notes. Because the notes themselves do not indicate, and you have not otherwise explained, whether they were communicated among privileged parties, they may not be withheld on the basis of section 552.107. Accordingly, we have marked the information you may withhold pursuant to section 552.107 of the Government Code.

You also assert that portions of the submitted information, including the handwritten notes, constitute attorney work product. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996).

The first requirement that must be met to consider information "attorney work product" is that the information must have been created for trial or in anticipation of litigation. In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

National Tank v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204.

The second requirement that must be met is that the work product “consists of or tends to reveal the thought processes of an attorney in the civil litigation process.” Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* Having considered your representations and reviewed the information at issue, we agree that portions of the submitted information constitute attorney work product and may therefore be withheld pursuant to section 552.111. However, we find that you have failed to show that the remaining information at issue consists of attorney work product. Accordingly, we have marked the information you may withhold as attorney work product pursuant to section 552.111 of the Government Code.

Next, we address your argument that some of the submitted information is excepted from disclosure under the deliberative process aspect of section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision No. 615 at 4-5 (1993). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter

as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

After reviewing the information at issue, we have determined that some, but not all, of the documents you have marked pursuant to section 552.111 reflect advice, recommendations, or opinions regarding the county's policymaking processes. We have marked the information that the county may withhold under the deliberative process privilege aspect of section 552.111.

Finally, we note that the submitted information also contains an e-mail address obtained from a member of the public. Section 552.137 makes certain e-mail addresses confidential, and provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The county must, therefore, withhold the e-mail address that we have marked under section 552.137.

In summary, the county must withhold the information that we have marked (1) under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practices and Remedies Code; (2) under section 552.117(2) for peace officers; (3) under section 552.117(1) for employees who made a timely election; (4) under section 552.130, (5) under section 552.136, and (6) under section 552.137. We have marked the information that the county may withhold (1) under section 552.107(1); (2) as attorney work product under section 552.111; and (3) under the deliberative process privilege aspect of section 552.111. Social security numbers may be confidential under federal law. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

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complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 181036

Enc. Submitted documents

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